Supreme Court of the United States

No. 548

EUGENE M. TRAVIS, as Comptroller of the State of New York,
Appellant.

vs.

YALE & TOWNE MANUFACTURING CO.,
Appellee.

APPELLANT'S BRIEF

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STATEMENT

This is an appeal, under section 238 of the Judicial Code, from a decree of the District Court for the Southern District of New York enjoining the enforcement of the New York Income Tax Law against non-residents, on the ground that it is unconstitutional under the Constitution of the United States. The bill of complaint demanded a perpetual injunction against the Comptroller of the State of New York prohibiting him from enforcing against the complainant the provisions of chapter 627 of the Laws of 1919 of New York, on the grounds that the statute violated the interstate commerce clause of the Constitution; that it impaired the obligation of contracts; that it deprived citizens of the States of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of the State of New York; that it abridged the privileges and immunities of citizens of the United States and deprived the complainant and its employees of their property without due process of law, and denied to them the equal protection of the laws. The defendant moved to dismiss the bill — in effect demurring. Judge Knox denied the motion, writing an opinion holding the act unconstitutional as violating section 2 of article 4 of the Constitution and the Fourteenth Amendment, in discriminating against non-residents in the exemptions allowed. The answer was then filed admitting the allegations of fact of the bill but denying the conclusions of law and upon the trial, in accordance with the accepted practice, Judge Mayer followed the decision upon the motion and granted the relief

prayed for in the bill. After the final decree was entered the defendant applied to this court. No questions are involved except the questions whether the statute violates the various sections of the Federal Constitution, with which the complainant claims it is in contravention.

A complete copy of the New York Income Tax Law is appended at the end of this brief, but the parts involved in this controversy may be summarized as follows:

Section 351 imposes an income tax upon every resident of the State with respect to his entire net income and " a like tax is hereby imposed * * * upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

In computing gross income non-residents are favored by section 359, paragraph 3, which provides:

> " In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article."

In computing net income from gross income certain deductions are allowed to residents which are not allowed to non-residents:

Section 360, paragraphs 5 and 6 provide for deduction of:

> "5. Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a taxpayer other than a resident of the state, only as to such transactions within the state.
>
> "6. Losses sustained during the taxable year of property not connected with the trade or business (but, in the case of a taxpayer other than a resident, only of property within the state) if arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise."

It should be noted in this connection that the non-resident is not allowed to deduct losses on property, the profits from which would not be subject to taxation, paragraph 11 providing:

> "11. In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations to be prescribed by the comptroller.

Section 263 providing for exemptions of $1,000 for a single man, $2,000 for a married man and $200 additional for each dependent, grants these exemptions only to residents, the section beginning:

"The following exemptions shall be allowed to any resident taxpayer."

Section 363 makes a provision for credit to non-resident taxpayers who have paid an income tax at home in a state which by its laws makes a reciprocal provision granting similar credit to residents of New York.

Section 366 provides for the deduction and withholding at the source of a tax upon income of non-residents derived by way of compensation for personal services. No similar provision is made with respect to residents, except that those who fail to file certificates showing their residence addresses within the state are treated, for the purpose of this section, as non-residents.

The complainant, a Connecticut corporation doing business in New York and elsewhere, has employees who are residents of New Jersey and Connecticut but who are occupied in whole or in part in the complainant's business in New York. A number of complainant's employees, who are non-residents of New York, perform substantially all of their services at the New York offices, and their salaries are paid at stipulated times in the City of New York from funds of the complainant within the State. Still other employees similarly situated have their salaries paid to them by checks sent by mail from the home office to such employees in New York. Still other non-resident employees are occupied in services which are rendered partly in Connecticut and partly in New York, some spending relatively little time in Connecticut and vice-versa, the amount of time spent in each place depending upon circumstances. The complainant also employs certain non-residents as traveling salesmen, who spend their time in New York and in traveling through other States.

The bill shows that if the complainant withholds from the salary of any employee an unconstitutional tax it will have no defense in an action by such employee for the amount withheld and that it therefore stands in the place of its employees. On behalf of such employees the complainant contends (we state these contentions in the order in which we take them up in this brief):

1. That it is beyond the sovereign power of the State to levy a general income tax upon non-residents.

2. That the act discriminates against citizens of other states in violation of § 2 of Article 4 of the Constitution.

3. That in violation of the Fourteenth Amendment the act denies to nonresidents the equal protection of laws.

4. That in violation of the Fourteenth Amendment the act deprives both withholding agents and nonresidents of property without due process of law.

5. That the act violates the commerce clause of § 8 of Article 1 of the Constitution.

6. That the act impairs the obligation of contracts in violation of § 10 of Article 1 of the Constitution.

SPECIFICATION OF ERRORS

Technically, the only error claimed is that an injunction was granted where none should have been. Practically, we consider ourselves aggrieved because the court below held the New York Income Tax Law unconstitutional as denying to citizens of other states the privileges and immunities of citizens of New York, and as denying the equal protection of laws; it being our contention that the act is constitutional in all respects.

POINTS

I

ON THE RIGHT OF THE STATE TO LEVY AN INCOME TAX ON NON-RESIDENTS.

a. Incomes a Proper Subject of Taxation

In view of the history of income taxation in England, the United States, and the several states, it can be accepted without argument that the power of taxation, inherent in a sovereign, includes the power to lay a tax upon incomes.

> "All subjects over which the sovereign power of a State extends, are objects of taxation."
>
> *McCulloch* v. *Maryland,* 4 Wheat, 316, 429.

b. Nature of Income Tax Immaterial

Whether a tax levied upon incomes from all sources is a direct or an indirect tax was a question of prime importance in considering the validity of federal income taxes, prior to the adoption of the Sixteenth Amendment, but it has no importance since the adoption of that amendment, and it never had any importance with respect to taxes laid by the states. The language in the opinions in *Pollock* v. *Farmers Loan and Trust Co.,* 157 U. S. 429, 158 U. S. 601, to the effect that taxes on the income from property were taxes on that property, was merely a step in the logical argument adopted in reaching a conclusion that such taxes were in part direct taxes within the meaning of clause 5 of section 9 of article I of the Constitution. That the court will not be considered to have intended that language to establish as a

rule of law that an income tax is for all purposes a tax upon the property from which the income is derived, is clearly shown by the decision in *Peck & Co.* v. *Lowe,* 247 U. S. 165, to the effect that a tax on incomes generally is not a tax on exports within the constitutional prohibition, where it is levied on the income of an exporter. The court said of the federal income tax (at p. 174):

> " The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see *Stanton* v. *Baltic Mining Co. supra,* p. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminating way, but just as it is laid on other income."

It might be argued that an income tax is *sui generis* — neither a tax on property, on a privilege, nor on the person — but a tax on the right to receive income (*Peck & Co.* v. *Lowe, supra*); or it might be argued that it is a commutation tax or a composite tax. As a composite tax it might be said that in so far as it taxes the rent from real property it is a real property tax; in so far as it is a tax on the increased value of personalty, it is a personal property tax; in so far as it is a tax on the profits from the purchase and sale of property, it is an excise on sales or on commerce; in

so far as it is a tax on income from trade, profession or labor, it is a privilege tax; and in so far as it taxes residents on income from sources without the territorial jurisdiction of the sovereign, it is a pure personal tax. The characterization of a tax by administrative officers, by the phraseology of the statute, or the opinion of other courts, is not controlling. This court will look only at the practical *effect* of the tax as it is enforced.

In *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294, this court said:

> " we * * * are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts. *Galveston, Harrisburg & San Antonio* v. *Texas,* 210 U. S. 217, 227; *St. Louis Southwestern Ry Co.* v. *Arkansas,* 235 U. S. 350, 362; *Kansas City &c. Ry. Co.* v. *Kansas,* 240 U. S. 227, 231."

The statute in this case provides (§ 351):

> "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the

> rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

It is obvious that the tax on residents and non-residents is the same, regardless of the different phraseology, so far as both are taxed. In so far as the tax extends to income of residents from sources without the State, there is no similar tax upon non-residents, but that is nothing for the latter to complain of.

It really does not matter whether this tax be regarded (so far as non-residents are concerned) as direct or indirect, a tax on the person, on property, or on privilege. States can and do levy all three kinds. The only question is whether the State has *power* to enforce this tax, and its nature does not assist in determining that question.

e. Power of Sovereign

Whether or not sovereign power to enforce a tax exists, depends solely on the ability of the State to collect it without extending its jurisdiction beyond its territorial boundaries. The sovereign can levy taxes on property which is tangible and within its boundaries, by its physical possession of that property. It can enforce taxes on privileges or rights, through preventing their exercise within its boundaries by those who do not pay. It can extend personal taxes to those over whom it has personal jurisdiction, compelling them to submit or move out.

This inherent power in the sovereign extends equally to residents and to non-residents, to citizens and to aliens.

And the underlying reason for taxation: the support of the government in its protection of the lives, liberty and property of those having life, liberty or property within its borders, extends equally to residents and non-residents, citizens and aliens.

The best definition of taxation we have discovered was uttered by Judge Ingersoll in *Duer* v. *Small,* 4 Blatchf. 263, 7 Fed. Cas. No. 4116. He said (p. 264):

> "Taxes are a portion that each individual gives of his property, in order to secure or have the perfect enjoyment of the remainder. Governments are established for the protection of persons and property within the limits of the State; and taxes are levied to enable the Government to afford or give such protection. They are the price or consideration paid for the protection afforded. When the person of an individual receives the protection of the State by its laws, it is right that he should afford to the State, in the way of taxes, a recompense or consideration for such protection; for, otherwise, that protection could not be extended to him. Without taxes, the State would be powerless to afford protection; and, when the property of an individual receives the protection of the State, it is equally right that the property protected, no matter whether it be real or personal, should in such way yield a recompense or consideration. The owner of property within the limits of a State, no matter whether the property be real or personal, and no matter where the owner has his domicile has a right to call upon the Government of

> the State to protect such property by its laws and its officers acting under such laws. But such protection cannot be afforded, unless means, by the way of taxes, are furnished to afford the protection. And taxes are no more to be levied upon the property of the resident to protect the property of the non-resident, than taxes are to be levied upon the property of the non-resident to protect the property of the resident. The property of a non-resident within the limits of a State, whether it be real or personal, is equally protected by the laws with the property of a resident. There would appear, therefore, to be no good reason why it should not equally pay in taxes for such protection — no good reason why the non-resident, with the resident, should not give a portion, in order to secure the perfect enjoyment of the remainder."

This inherent power of the sovereign exists in each of the states except as restricted by the Federal Constitution.

> "Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of the taxation is unlimited, where the subjects to which it applies are within her jurisdiction."
>
> *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319.

With the exception of matters prohibited by the Constitution specifically (such as exports, or interstate commerce), or impliedly (such as the activities of the national government), there is no doubt of the right of the state to tax *anything* which is within its territorial jurisdiction. The only constitutional questions that ordinarily arise in respect to modern taxation are (1) those of the

situs of intangibles, (2) those of the equal application of taxing statutes under the fourth article of the Constitution and the Fourteenth Amendment, and (3) those of due process of law.

d. Power to Enforce Income Tax

The question of the right to impose a tax on incomes of non-residents is not a question of the nature of the *tax* nor is it a question of whether income is property or the acquisition of it a right or a privilege; but it is a question of the *situs* of the income.

The doctrine that movable property follows the person for purposes of taxation has given way to the doctrine that where property has a *situs*, there it is taxable.

> *Bristol* v. *Washington County*, 177 U. S. 133.

The proposition that intangible property has its *situs* for the purposes of taxation at the domicile of the owner has been reiterated to the point where the logical underlying reason for it has been lost to many. The reason for regarding the *situs* of intangible property as the domicile of the person depends not on the meaning of *property*, but on the meaning of *situs*. That property is said to be taxable only at its *situs* is because *where property is taxable* — that is, wherever a sovereign can enforce a tax against it — *there it has a situs.*

In determining whether income has a *situs* for purposes of taxation in a given state, we should begin, not by saying: "Where is its situs?" that we may determine whether it is taxable, but

rather: "Can it be reached by taxation?" to determine whether it has a *situs* there. If it can be reached by taxation by a state — if the state can enforce a tax against it by due process of law — then it has a *situs* for taxation in that state. So we should look in drawing parallels, not to the conclusions of courts with respect to the *situs* of other intangibles, but to the reasons for those conclusions. We should not say that because some intangible has one *situs* at the domicile of the owner, no other intangible can have one elsewhere.

A state may not tax a non-resident on the ownership of stock of a foreign corporation, though the certificate be in the state, for the mere impounding of the certificate will not prevent the owner from selling his stock. The state has no means of enforcing the tax, and consequently the courts hold that the *situs* of the stock for purposes of taxation is not in the state. But the state of the domicile of the owner, having jurisdiction of his person may force him to pay a tax on it, hence it is held that its *situs* is at his domicile. *Hawley* v. *Malden*, 232 U. S. 1; or the state of domicil of the corporation may tax the shares of all stockholders, resident or non-resident, because it has jurisdiction to prevent the very existence of the corportion. *Corry* v. *Baltimore*, 196 U. S. 496. The same stock is thus taxable in two states, and to be so taxable it must have a *situs* in each.

A state cannot (except by denying to either the owner or the corporation some right disconnected with the ownership of the bond, and thus denying due process of law) force either the non-resident owner of a bond or the corporation which issued

it, to pay a tax on a bond not physically within the state and not made nor payable therein, nor secured by property therein. And so it is held that the bond has no *situs* for purposes of taxation in that state. *State tax on Foreign Held Bonds*, 15 Wall. 300. But if the state has jurisdiction of the person of the bondholder, it may force him to pay a tax on it, *Fidelity, &c., Trust Co.* v. *Louisville*, 245 U. S. 54; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Tappan* v. *Merchants National Bank*, 19 Wall. 490. If the state has jurisdiction of the corporation it may tax the bond (unless it was made and is payable without the state and secured by property without the state) by taking from the corporation some of the value of the bond and relieving the corporation to that extent from paying the bondholder. So it is held that the bond has a taxable *situs* at the domicile of the debtor. *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Liverpool, &c., Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346 (on page 355 of which the Foreign Held Bonds case is distinguished); *Blackstone* v. *Miller*, 188 U. S. 189. Or, where the bond so evidences the debt that the paper evidence can be sold as property, a state in which the bond is physically located may tax it, enforcing its tax by taking possession of it. And it is held that the bond then has a *situs* where it is located. *New Orleans* v. *Stempel*, 175 U. S. 309. *Board of Assessors* v. *Comptoir National*, 191 U. S. 388.

Thus a bond may be taxable in three different states at the same time. It has a *situs* in each of three states. *Mobilia sequuntur personam* ceases to be exclusive. The doctrine that intangibles follow the person has come to mean only that

they *can* be taxed at the domicile of the owner, not that they cannot be taxed elsewhere. As a matter of law, they can be taxed wherever a state can, as a matter of fact, enforce (by due process) a tax against them. The law follows the fact.

> " No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicil governs the whole. But those inconsistencies infringe no rule of constitutional law. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 41."
>
> *Blackstone* v. *Miller*, 188 U. S. 189, 205.

The state by levying a tax which it has power to enforce *fixes* a *situs* of the thing taxed, within the state. In upholding a tax on non-resident memberships in local chambers of commerce, this court said:

> " But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the exchange in the City of Minneapolis, and, we are of the opinion, * * * that it was competent for the State to fix the *situs* of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located." (Citing cases.)
>
> *Rogers* v. *Hennepin County*, 240 U. S. 184, 191.

What is the fact with respect to a *tax on income?* A person receives income in one of three ways. It is (1) the product of property, or the money realized by the sale of such product, (2) the profit gained in the purchase and sale of property, or (3) the compensation for personal service. A state has power to enforce a tax on the product of property by seizing the product or the property, so long as they are in its territory; it has power to enforce a tax on the profits of bargain and sale by preventing the agreement, the delivery, or the payment within its borders, except upon the payment of the tax; it has power to enforce a tax on compensation for services by preventing the payment within its boundaries of the compensation or by preventing the rendition within its boundaries, of the services, except upon the payment of the tax.

The exercise of a privilege is in the nature of a property right or in the nature of the rendition of personal service, but in either case, if exercised in the state, the state may tax it. *Rogers* v. *Hennepin County*, 240 U. S. 184.

In each of these cases the State has *power* to enforce its taxes equally against residents and against non-residents. It follows that in law the income from each of the divisions has a taxable *situs* in the state, regardless of whether it may have another elsewhere. The law follows the fact. And the fact is that the state can enforce its tax against non-residents as well as residents. The domicile of the recipient of income has nothing to do with it. The *fact* of the *power* remains, even if he removes his domicile from the state, even if he has never been near the state.

The power is obvious. The only limitations on the exercise of that power are that it must be exercised with respect to taxes which do not deny to citizens of one state the rights, privileges, and immunities of citizens of another state, or deny the equal protection of laws, and that its exercise shall be through due process of law, and shall not interfere with interstate commerce nor impair the obligation of a contract.

II

THE NEW YORK INCOME TAX LAW DOES NOT DENY TO CITIZENS OF ANY STATE ANY OF THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE SEVERAL STATES.

Clause 1 of section 2 of article IV of the Federal Constitution is in effect almost paraphrased by section 1 of the Fourteenth Amendment. The latter is broader, but any statute which violates the former would certainly be in violation of the latter. In effect the former provides that a *citizen* of another state shall not be discriminated against merely because of his citizenship, while the latter protects all persons against unreasonable discrimination. For this reason everything that is said under title III, below, applies equally well upon this point, but there are a few things which can be said under this title that would have no necessary bearing under title III, hence we have refrained from consolidating the two.

Citizens of other states, as *citizens,* and only as such, are protected by article IV, section 2, clause 1. So, if there is no discrimination against them *as citizens*, the provision is not violated.

There is no discrimination in the New York income tax law in favor of citizens of one state as against citizens of any or all others. The word "citizens" is not found in the statute. It is true that distinctions are drawn between residents and non-residents, but this is regardless of citizenship — non-resident citizens of New York are treated like all other non-residents, and citizens of other sovereigns who are resident in New York are treated exactly like resident citizens.

Section 1 of the Fourteenth Amendment provides that citizens of the United States are citizens of the state wherein they reside. But the terms "reside," "residence" and "resident" have different meanings at different times. They have different meanings in different statutes, and sometimes in different parts of the same statute. Text writers on conflict of laws have always drawn a distinction between *residence* and *domicil.* They say a man may have several residences, but only one domicil. But it is evident that a citizen of the United States cannot be simultaneously a citizen of several different states, by having a residence (as the text writers use the term) in each of them. The term "reside" in the Fourteenth Amendment probably means to "be domiciled;" or, to use a phrase commonly understood among the people, to "maintain a voting residence." It does not mean to "maintain a voting residence." It does not mean to "have a place of abode,"— especially if one has several places of abode. It implies permanence, though the word, in other connections, does not necessarily carry any such implication. The defendant in this case has already had submitted to

him a question by a prospective taxpayer, inquiring as to his classification, who says: "My regular residence is in New York, but I maintain a voting residence in Philadelphia." *Residence* in the ordinary acceptance of the term, in the sense in which the text writers mentioned use it, is a matter of physical locations of persons and houses, while *domicil* depends further upon intent—upon *animus manendi* and *animus non revertendi.* Citizenship in a state likewise depends largely upon intent. The terms *resident* and *citizen* are not normally synonymous and are not rendered exclusively so by the use in the Fourteenth Amendment of the word "resident" in one of its many meanings.

This court said, in *La Tourette* v. *McMaster*, 248 U. S. 465, 470:

> **"The court thus distinguishes between citizens and residents and decides that it is the purpose of the statute to do so, and by doing so it avoids discrimination. In other words, it is the effect of the statute that its requirement applies as well to citizens of the State of South Carolina as to citizens of other states, residence and citizenship being different things."**

In that case *three years' residence* was required by the statute before one could be an insurance broker, but the court did not regard it as discriminatory against citizens of other states.

That residence may be in some cases a proper basis for legislative classification is a theme elaborated upon in title III, below, but it is settled that where residence *is* a proper basis for classification, the adoption of such basis is not violative of article IV, section 2, clause 1.

In *Travellers Ins. Co.* v. *Connecticut,* 185 U. S. 364, this court upheld a classification in a taxing statute of resident stockholders in one class and non-resident stockholders in another, and ruled that it did not violate the constitutional equality of citizens of the different states.

An early New York statute, restricting imprisonment for debt, abolished that form of execution against residents, but left it effective against non-residents. The act was held not to violate article IV, domicil and residence being distinguished. *Frost* v. *Brisbin,* 19 Wend. (N. Y.) 11.

In *Chemung Canal Bank* v. *Lowery,* 93 U. S. 72, this court paraphrased a state statute of limitations in these words (p. 76):

> "This statute may be expressed shortly thus: when the defendant is out of the State, the statute of limitations shall not run against the plaintiff, if the latter resides in the state, but shall, if he resides out of the state."

And the court held that statute constitutional.

An ordinance giving resident owners of property a right to protest against an assessable improvement and denying it to non-resident owners, was upheld in *Field* v. *Barber Asphalt Paving Company,* 194 U. S. 618.

Statutes authorizing writs of attachment against the property of non-residents and denying them in similar cases against the property of residents are common everywhere. If they violated article IV they would not be tolerated. That they do not was settled in *Central Loan and Trust Company* v. *Campbell Commission Co.,* 173 U. S.

84, and in *Blake* v. *McClung,* 172 U. S. 239, where this court said (pp. 256–257):

"We must not be understood as saying that a citizen of one state is entitled to enjoy in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the State. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states. The constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established."

If the word "resident" used in the New York statute can reasonably have a different meaning from that of the word "reside" as used in the Fourteenth Amendment, there is no discrimination against non-residents on account of their *citizenship,* nor against *citizens* of other states. If the word is subject to construction, the legislature will be presumed to have intended it to receive the construction which renders the act constitutional, not that which renders it void.

III

THE NEW YORK INCOME TAX LAW DOES NOT DENY TO ANY PERSON THE EQUAL PROTECTION OF THE LAWS.

The statute is attacked on the ground that it violates the Fourteenth Amendment (A) in granting certain exemptions and allowing certain deductions to residents, which are not allowed to non-residents and (B) in providing different methods for collecting from residents and non-residents.

A

The discriminations between residents and non-residents in exemptions and deductions are reasonable, proper, and constitutional.

(a) Classification in Taxation is a Proper Exercise of Legislative Power.

There is no room for argument on the proposition that in providing for taxes, a legislature not only may, but practically must classify the objects of taxation. The greatest injustice and

hardship would otherwise occur. As was said in *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, 351:

> " This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

and in *Barrett* v. *Indiana,* 229 U. S. 26, 29–30:

> " The equal protection of the laws requires laws of like application to all similarly situated, but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to make the laws and of the courts to enforce them. This court has had such frequent occasion to consider this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification and before a court can interfere with the exercise of its judgment it must be able to say ' that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' This was one test laid down in *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U. S. 267, and has been quoted and followed with approval in *Williams* v. *Arkansas, supra;* and *Watson* v. *Maryland, supra.*"

and again in *Giozza* v. *Tiernan*, 148 U. S. 657, 662:

> "Nor, in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339."

This classification may discriminate between classes in rates of taxation, *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 283; *Michigan Central R. R.* v. *Powers*, 201 U. S. 245; or in exemptions from taxation, *Beers* v. *Glynn*, 211 U. S. 477. In the latter case this court said:

> "The power of the State in respect to the matter of taxation is very broad, at least so far as the Federal Constitution is concerned. It may exempt certain property from taxation while all other is subjected thereto. It may tax one class of property by one method of procedure and another by a different method." (p. 484).

and:

> "Indeed, it may be laid down as a general rule that mere inequalities or exemptions in the matter of State taxation are not forbidden by the Federal Constitution." (p. 485.)

and in *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person

within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their Constituion. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of

society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

and in *Citizens' Tel. Co.* v. *Fuller*, 229 U. S. 322, 329:

> "The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the legislature."
>
> * * * * *
>
> "It may, therefore, be said that in taxation there is a broader power of classification than in some other exercises of legislation."

And it follows that a taxing statute is not invalid because of simple inequality between classes. This court said in *Int. Harvester Co.* v. *Missouri*, 234 U. S. 199, 210:

> "Both, therefore, invoke a consideration of the power of classification which may be exerted in the legislation of the State. And we shall presently see that power has very broad range. A classification is not invalid because of simple inequality. We said in *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, 106, by Mr. Justice Brewer, 'The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.'"

It would seem that the only restriction on the power of classification is that there must be real differences between the situations of the different classes. As the court said in *Northwestern*

Mutual Life Ins. Co. v. *Wisconsin*, 247 U. S. 132, 138:

> "That the State is not because of the Fourteenth Amendment required to tax all property alike, and may classify the subjects selected for taxation, is too well established to require citation of the many cases in this court which have so held. The classification may not be arbitrary and must rest upon real differences — subject to these qualifications the State has a wide discretion."

What constitutes a real difference depends upon the purpose and extent of the legislation and all the circumstances of the subjects and objects thereof. For purposes of taxation there is no real difference between a man of thirty and a man of eighty, between a man weighing 165 pounds and one weighing 350 pounds, but when it comes to calling the militia or organizing a police department there is a real difference between the two men. And *per contra,* for militia duty there is no difference between the man with a thousand dollar income and the man with a million dollar income, but for purposes of taxation there is a vast difference. In adopting militia laws, the legislature classifies men according to their fitness to serve and the situation of their dependents. In adopting codes of legal procedure the legislature classifies men according to the facility with which they may be subjected to the jurisdiction of the court: requiring personal service on residents but permitting service by publication against non-residents, requiring security for costs from non-residents but not from residents, authorizing writs of attachment of the property or even the persons of non-residents but not of residents.

In tax legislation the legislature classifies men according to occupation, according to the nature or quantity of their property, or its taxability, or according to the facility with which the tax can be enforced. In each case there must be some real difference connected with the subject or object of the legislation.

On the subject of legislative classifications this court not long ago expressed the general rule and also enumerated many classifications which had been upheld. *Tanner* v. *Little*, 240 U. S. 369, where the court said (pp. 382–383):

> " Classification is not different in law than in other departments of knowledge. ' It is the grouping of things in speculation or practice because they " agree with one another in certain particulars and differ from other things in those particulars." ' *Billings* v. *Illinois*, 188 U. S. 97, 102. Upon what differences or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it and distinguish in legislation between red-haired men and black-haired men and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject matter is hence to be considered. It may not make the distinction adverted to but it may make others the appropriateness of which, considered logically, may be challenged, for instance: between sales of

stock upon margin or for immediate or future delivery (*Otis* v. *Parker*, 187 U. S. 606); between acts directed against a regularly established dealer and one not so established (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157); in an inspection law, between coal mines where more than five men are employed and coal mines where that or a lesser number are employed (*St. Louis Cons. Coal Co.* v. *Illinois*, 185 U. S. 203); and a like distinction in a workmen's compensation law (*Jeffrey Mfg. Co* v. *Blagg*, 235 U. S. 571); between a combination of purchasers and a combination of laborers; (*International Harvester Co.* v. *Missouri*, 234 U. S. 199); **between residents and non-residents** (*Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364); in a law requiring railroads to heat passenger coaches, between roads of 50 miles and roads of that length or less (*N. Y., N. H. & H. R. R.* v. *New York*, 165 U. S. 628; see also *Dow* v. *Beidleman*, 125 U. S. 680; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688); between theatres according to the price of admission (*Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61); between land owners as to liability for permitting certain noxious grasses to go to seed on the lands (*Missouri, Kansas & Texas Ry.* v. *May*, 194 U. S. 267); between businesses, in the solicitation of patronage on railroad trains and at depots (*Williams* v. *Arkansas*, 217 U. S. 79); and a distinction based on the evidence of the qualifications of physicians (*Watson* v. *Maryland*, 218 U. S. 173, 179)."

(b.) The Classification of Residents and Non-Residents by the New York Income Tax is Reasonable.

There is a real difference between residents and non-residents in many matters. Undoubterly there is a difference between residents and

non-residents in the elective franchise and the right to hold office. Nobody would ever suggest that a man was being deprived of his rights, privileges and immunities or of the equal protection of the laws in that he was refused the right to vote at a general election or take public office in a state where he did not reside. In police matters there is often a real difference between residents and non-residents, and it is reasonable to provide that only residents may enter given occupations. *La Tourette* v. *McMaster*, 248 U. S. 465. The only right of the non-resident, if he wishes to carry on such a occupation, is the right to became a resident, and get into the proper class. In legal procedure there is a real difference between residents and non-residents, based upon the facility with which they can be brought into court and the means by which the court can enforce its decrees against them. And classification on the basis of this difference is upheld. (See cases cited on pp. 20–22 *ante*.)

In taxation there may be a real difference between residents and non-residents — not in their ability to pay perhaps, but in the extent to which the state has jurisdiction to tax them, and the facility with which the state can enforce its tax.

In *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, this court upheld a state law taxing domestic life insurance companies on one basis and foreign companies upon another, saying (p. 139):

> "The state court held, and we think properly so, that foreign insurance companies occupy a relation to the State which is different from that of a domestic company. The latter has within the borders and taxing

> jurisdiction of the State a large amount of personal property, receiving protection, and subject to taxation. The foreign company has its reserves in the State of its domicile, and there subject to local taxation, which is of itself a substantial difference."

Is there not a similar and equally substantial difference between residents and non-residents under the New York income tax? Non-residents, like the foreign corporations in the cited case, have property without the state from which they derive income which is not subject to taxation by the State of New York, but residents can be and are taxed by the State of New York on income derived from property wherever located. Non-residents may derive income without the state from occupations, and the state cannot tax them, though it can and does tax its residents on income derived from occupations wherever carried on. The residents, generally, can be and are subjected to greater taxation than the non-residents, because there is a real difference between them — in the jurisdiction of the state to enforce taxes — and they are properly classified in two classes (which we shall designate as A and B), class A subjected to a tax on all income and class B subjected to a tax only on income from within the state. And the same classification is proper when we turn to the credit side of the ledger and grant exemptions. Class A gets exemptions of $1,000 and $2,000 under section 362 of the New York statute, with $200 extra for each dependent, while class B does not get them. Class A may deduct losses on property without the state (paying taxes on income from that property) but class B may

not (any more than it pays taxes on income therefrom). Whether class A or class B really has the better of it is entirely a question of how one postulates the facts in his hypothetical example. The plaintiff thinks of cases such as this: X, residing in New Jersey, earns all his income, $5,000, in New York — he pays $50 tax; while Y, residing in New York and earning $5,000, in New York or in New Jersey pays only $30 — claiming the married man's exemption $2,000. But the defendant postulates this: X lives in New Jersey, Y in New York, each derives $5,000 income from sources in New York and $5,000 from sources in New Jersey. X would pay $50, but Y would pay $80 (even after claiming exemption on $2,000).

Professor Seligman, who, as an expert on taxation assisted the legislative committee in drafting the New York income tax law, explained the purpose of the drafters and the reasons underlying that purpose in a memorandum to the Attorney-General of the State; that memorandum contains the following language, pertinent upon this point:

> "Residents of a state or citizens of a country ought to be subjected to the general income tax on their entire income, no matter from what source derived. On the other hand non-residents or foreigners should be subject only to the special income taxes; that is to say they should be liable only on such income from special sources as is received or earned within the state. In other words, the income from land or other property situated within the state, or from business, professions or occupations carried within the state, ought to be taxable to non-residents as well

as to residents. Where there are no special income taxes, but only a general income tax, the same principle would apply: residents would be taxable upon their entire income; non-residents only upon the income received or earned within the state.

This solution satisfactory so far as it goes, is open to the criticism that if two states impose a similar tax and follow the same principle they may create cases of unjust double taxation. For if individual A earns his money and spends it in one state, he would be taxed only once on his entire income; while individual B with the same income who earns his money in one state and has his legal residence in another would be taxed twice — once by the state where the income is earned and again by the state where he resides. An escape from this difficulty is to be sought in a provision whereby the state where the income is earned would permit the non-resident to make a proportionate deduction of such tax on such income earned within the state from the tax, if any, which might be levied by the state of his residence. [cf. § 363].

It might, indeed, be asked why a simpler solution would not be to cut the Gordian knot and to leave non-residents scot-free, so that each state would tax only its own residents on their entire income. Why should we not content ourselves with levying a general income tax, and make no attempt to levy special income taxes? The answer is that many states do not impose an income tax at all; and that even if they do impose an income tax, there is no assurance that it would be assessed at the same rate. In default of any such assurance, it is more equitable to impose the same burden upon residents and non-residents alike, so far as the income derived from

sources within the state is concerned. That is to say, both residents and non-residents would in theory be subject to precisely the same special income taxes, and residents would then be subject to something in addition — namely that part of the general income tax not included in the special income taxes. Why for instance, if the state of New Jersey imposes no income tax on its own should its residents who carry on their business in New York in competiton with New Yorkers be exempt from taxation in New York on that business? To erect this exemption into a general rule would not only result to the disadvantage of the New Yorkers who are conducting their business or pursuing their occupations in New York side by side with the Jerseyites but it would have also this most important practical consequence that every New Yorker who desired to escape his taxes could easily do so by transferring his legal residence to his country home where he happens to live during the summer months. In fact the chief reason why the general property tax has broken down in New York [City], is the facility afforded to wealthy New Yorkers to claim their legal residence in the environment of the city. The great advantage of the income tax over the property tax is that it tends to decrease this tendency. But this result would be entirely defeated if non-residents were exempted on their incomes earned within the state of New York. It is precisely to put a stop to this deplorable practice of local expatriation that the provision which taxes non-residents on their income earned within the state becomes of such great significance.

Any possible hardship to the *bona fide* non-resident, moreover, can be obviated by an arrangement providing for the avoidance of

double taxation. Such an arrangement is contained in the New York law which provides in section 363 as follows:

'Whenever a tax-payer other than a resident of the state has become liable to income tax to the state or country where he resides upon his new income for the taxable year, derived from sources within this state and subject to taxation under this article, the comptroller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed only if the laws of said state or country grant a substantially similar credit to residents of this state subject to income tax under such laws.'

In the deliberation of the Committee to which was assigned the duty of laying down the principles and of drafting the law, this problem aroused protracted discussion. The solution as contained in the law was suggested by the present writer and found favor with the Committee.

The practical working out of the system would then be as follows: If New Jersey, for instance, imposed no income tax at all the Jerseyite would be subjected to taxation in New York on his income earned within the state. To this there can be no possible objection. If two contiguous pieces of land were owned respectively by a New Yorker and a Jerseyite, there is surely no reason why the latter should be exempted on his income therefrom. If two neighboring and competitive business houses were occupied respectively by a New Yorker and a Jerseyite, there is

again no reason why, in the absence of any tax on the Jerseyite by his own state, the two competitors should not be treated equally. If two dentists, one a New Yorker and the other a Jerseyite carried on their profession on opposite sides of a street in New York, there is no possible reason why, in the absence of any tax by the state of New Jersey, the Jerseyite should be preferred to the New Yorker. Far from imposing any additional burden upon the Jerseyite, or interfering in any way with interstate commerce, the taxation of the Jerseyite would bring about scrupulous equality in treatment with that of the New Yorker. To do less than this would give him an unjustifiable preference.

As a matter of fact, however, such a preference is actually given to him in one respect. While the resident is taxed on his entire income including the income from intangible property, the non-resident is exempt from an income tax on his intangible, unless these are employed in his business. [cf. § 359, ¶ 3.] This preference to the non-resident is explicable on the ground that otherwise the market for New York securities and the very preeminence of New York as a financial center might be threatened. Inequality of taxation in favor of the non-resident is preferable to the decay of New York. But the point remains that in this respect non-residents are actually favored.

On the other hand, the principle provides that if New Jersey should levy an income tax, New York would allow the Jerseyite to deduct from the New York tax a proportionate part of the tax levied by New Jersey. This permission in justice should be subject to the condition, actually found in the New York law, of reciprocity i.e. that New Jersey would agree to treat New Yorkers in pre-

cisely the same way. The consequence of this would be that if New Jersey imposed an income tax at the same rate as that of New York, the Jerseyite would in final result pay nothing in the State of New York but would pay an equivalent tax in the State of New Jersey. This would operate to prevent the one great evil alluded to above viz. the inducement on the part of wealthy New Yorkers to claim a legal residence in New Jersey. For if they were to be taxed to the same extent by New Jersey, the inducement to emigrate would disappear. It is only in the case that the income tax of New Jersey might be imposed at a lower rate than that of New York that the Jerseyite would be taxable in New York on the difference. This result, however, is perfectly defensible. For not only would it operate to prevent the emigration of New Yorkers, but it would subject *bona fide* Jerseyites to the same burden as those borne by their New York competitors. It would not impose any additional burden on them and it would therefore not create any discrimination against citizens of another state.

The solution of the problem contained in the New York law therefore really constitutes a distinct step in advance in the equiable treatment of non-residents. In subjecting non-residents to taxation on their income derived from sources within the State, the New York law does not differ from either the Federal law or from any other important income tax law. For in every country almost without exception foreigners are taxed upon their income from sources within the country. The chief difference between the New York law and that of most countries is that in the latter case no such equitable provision is made for a proportionate and reciprocal deduction of the tax where the home country

imposes a tax on the same income. The avoidance of double taxation in such case is generally left to particular treaties between the respective countries. The New York law hence marks a decided step forward in the treatment of this important problem. Residents and non-residents alike are subjected to certain special income taxes; residents are subjected in addition to a general income tax and non-residents are freed from double taxation by a reciprocal deduction which operates similarly to free residents from double taxation by a sister state. The net result is equality all around.

In all other important respects save one, non-residents and residents are treated alike in the New York law. This one exception has to do with the question of exemption. In the case of resident tax-payers the New York law allows an exemption of from $1,000 to $2,000 according to whether the tax-payer is single or married, together with $200 for each dependent person. It might be claimed that the absence of any such exemption in the case of non-residents constitutes a discrimination. as a matter of fact, however, there is no reason for such a complaint.

The theory underlying the law is, as we have seen, that the state of residence may also impose an income tax. If New Jersey or Connecticut, for instance, were to impose an income tax, it could avoid all possible injustice to its residents on the part of New York by permitting a similar exemption. Under the reciprocal provision of the New York law, mentioned above, all difficulties would then be at once adjusted. For if the Jerseyite carrying on business in New York paid in New Jersey a tax on his total income, he would automatically receive the exemption in question, and as his tax in New York would then be deducted he would not suffer any unjust discriminative burden. There are only

two possible cases where there might be a chance of unequal treatment.

In the first place New Jersey might decide not to allow any exemption at all in its income tax, in which case the Jerseyite receiving his income in New York would no doubt be unfairly treated as compared with the New Yorker. This, however, would be due to the action of New Jersey, not of New York. The New York law goes as far as it is proper to go. To do more than this would be to prefer the non-resident. For if both New York and New Jersey granted an exemption, the New Jerseyite would pay on the excess over $4,000, the New Yorker on the excess over $2,000. A law which contemplates equal and reciprocal treatment of residents and non-residents alike cannot well be charged with discrimination simply because it is within the power of a sister state to cause this discrimination to its own citizens.

The second possible case of unequal treatment might occur where New Jersey does not impose any income tax at all and where the income of the Jerseyite is wholly or almost wholly earned within New York. In that case, and only in that case — not contemplated by the law, the framers of which confidently looked forward to the speedy adoption of an income tax by the adjoining states — the non-resident would be treated more severely than the resident. Residents and non-residents could in such a case be placed on exactly the same footing by permitting the non-resident to file a declaration of his entire income, within or without the State of New York and granting him such proportion of the statutory exemption as his income within the state bears to his entire income. Such an arrangement would, however, be exceedingly cumbersome and difficult to control."

We regard the case of *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364 as being directly in point upon the issues in this case. The Connecticut tax law taxed resident and nonresident stockholders of corporations in different ways. Resident stockholders were taxed through the local tax officers, a local tax, at the rates fixed for the localities. Nonresident stockholders were taxed directly by the state government, a state tax, at a fixed rate. The resident paid no state tax, the nonresident paid no local tax. There was, as a result of varying rates of local taxation, in some localities a difference in the *rate* of taxation. And a further difference was made—the tax was based upon the market value of the stock as reported by the corporations, but in local assessment of resident stockholders the act provided:

> " but so much of the capital of any such company as may be invested in real estate, on which it is assessed and pays a tax, shall be deducted from the market value of the stock, in its returns to the assessors." (p. 365.)

No similar deduction was permitted in the taxation of nonresidents, but the tax was collected at the source, through the corporation, at a fixed rate of one and one-half percent on the entire market value. The statute was attacked as discriminating against nonresidents in violation of Article IV of the federal Constitution and the Fourteenth Amendment. This court upheld the tax, saying (pp. 366–369):

> " The single question presented for our consideration is whether this legislation of the

State of Connecticut in respect to the taxation of the shares of stock in a local corporation held by non-residents is in conflict with paragraph 1 of section 2 of article IV of the Federal Constitution, or the Fourteenth Amendment thereto. It is alleged that there is such discrimination between resident and non-resident stockholders as works a denial of the equal protection of the laws, and to the prejudice of citizens of other states. The stock of the non-resident stockholder is assessed at its market value without any deduction on account of real estate held by the corporation. The stock of the resident stockholder is assessed at its market value, less the proportionate value of all real estate held by the corporation upon which it has already paid a tax. As thus stated, there would appear to be a wrongful discrimination, and that the non-resident stockholder was subjected to a larger burden of taxation than the resident stockholder, and this not as a result of the action of any mere ministerial officers in making assessments, but by reason of the direct command of the statute to include the real estate in the valuation in the one case and to exclude it in the other.

" But this apparent discrimination against the non-resident disappears when the system of taxation prevailing in Connecticut is considered. By that system the non-resident stockholder pays no local taxes. He simply pays a state tax, contributes so much to the general expenses of the State. While on the other hand, the resident stockholder pays no tax to the State but only to the municipality in which he resides. In other words, the State imposes no direct taxes for its benefit upon the property belonging to residents, but collects its entire revenue from corporations, licenses, etc. The rate of State tax upon the non-resident stockholder is fixed, fifteen mills

on a dollar, applying equally to all, while the rate of local taxation varies in the several cities and towns according to the judgment of their local authorities as to the amount necessary to be raised for carrying on the municipal government. Obviously the varying difference in the rate of the tax upon the resident and the non-resident stockholders does not invalidate the legislation. How then can it be that a difference in the basis of assessment is such an unjust discrimination as necessarily vitiates the tax upon the non-resident? The resident stockholder does not pay the fifteen mills to the State which is demanded of the non-resident, and the non-resident stockholder does not pay to any locality the sum, greater or less than fifteen mills, which may be imposed by the authorities of that locality. * * *

* * * "In other words, the State, dealing with the question of taxation of the shares of stock in a local corporation, found two classes; one, shares held by residents, and the other, those held by non-residents. It was believed that a resident in a city or town, enjoying all the benefits of local government, should be taxed for the expenses of that government upon all the property he possessed, whether that property consisted in part or in whole of shares of stock. On the other hand, the non-resident, enjoying little or none of the benefits of local government, was exempted from taxation on account of the expenses of such local government. At the same time it was not right that he should escape all contribution to the support of the State which created and protected the corporation and the property of all its stockholders, and so a tax was cast upon the non-resident stockholder for the expenses of the State. This, with kindred taxes, has been found sufficient to pay the running expenses

> of the State government. The resident is not called upon to pay any of the expenses of the State, but only to bear his proportional share of those of the municipality. The non-resident is called upon to pay no share of the expenses of the municipality, but only to contribute to the support of the State."

A more exact parallel to the situation in the case at bar could hardly be drawn. In the case at bar residents are taxed on net income from whatever source, nonresidents only upon the net income from property and from business, trade, profession or occupation carried on in the state. In the Connecticut case, residents were subjected to local taxation and nonresidents to state taxation. If anything our statute would seem to be less discriminatory, for the rate is uniform for residents and nonresidents, while in the Connecticut statute it was not. The principle of the exemptions and deductions allowed to residents and denied to nonresidents in our statute, has the same basis as the deductions allowed under the Connecticut law to residents only — that they are taxed in other ways, where the nonresidents are not.

The fact (if it be true) that the exemptions and deductions allowed in the New York statute are greater than those allowed in the Connecticut law, has nothing to do with the validity of the statute. If the *power* to levy a tax exists, the *rate* fixed will not render it unconstitutional. *Tanner* v. *Little*, 240 U. S. 369. The power to exempt certain things to the exclusion of others follows the same rules as the power to tax certain things, to the exclusion of others — it is only another way of stating the same proposition. And if the rate is immaterial in determining con-

stitutionality as to *taxation*, so the rate of *exemption* is immaterial.

In the Connecticut case, counsel attacking the law postulated situations in which nonresidents would have to pay more taxes on the same stock than would residents. But the court postulated other situations where the opposite would be true, just as we have met the hypotheses of the plaintiff with counter hypotheses (p. 33 above). It is settled that mere hardship in imaginable or actual cases will not vitiate a tax, and further:

> " It is established that a distinction in legislation is not arbitrary, *if any state of facts reasonably can be conceived that would sustain it*, and the existence of that state of facts at the time the law was enacted must be assumed." (Italics ours.)
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> *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357.

As the court said in *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S., 251, 256:

> " It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an *exact* exclusion or inclusion of persons and things. See *Gulf, etc. Co.* v. *Ellis*, 165 U. S. 150, and the cases cited; *Missouri, etc. Co.* v. *May*, 194 U. S. 267."

It is said that Governor Smith has conceded the law to be impolitic, but that is not a matter with which this court will concern itself. As was said in *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 293.

> " it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. *Nor with the impolicy of a law has it concern.* Mr. Justice Field said in *Mobile County* v. *Kimball*, 102 U. S., 691, that this court is not a harbor in which can be found a refuge from ill advised, unequal and oppressive State legislation. And he observed in another case: ' It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity.' " (Italics ours).
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> * * * * * * * *
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> "And so Mr. Justice Miller, speaking for the court in *Davidson* v. *New Orleans*, 96 U. S. 97, 105, said: The Federal Constitution imposes no restraints on the State in regard to unequal taxation." (p. 295).
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> * * * * * * * *
>
> " And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates ' equally and uniformly upon all persons in similar circumstances.' " (p. 296).

We, as appellants, have necessarily anticipated as far as possible the attack of the plaintiff's counsel upon the constitutionality of the statute, but in so doing we have not shifted the burden of demonstrating that the classification is not made upon a reasonable basis. That burden is still

upon the plaintiff. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61. In that case the court summarized as follows (p. 78):

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel* v. *Wilson*, 204 U. S. 36, 41; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251, 256; *Munn* v. *Illinois*, 94 U. S. 113, 132; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 615."

That case involved the police power. But the power of classification in taxation is equally broad. *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 329.

In short: The legislature has power to classify on reasonable basis; the basis of classification of residents and nonresidents in this case is a rea-

sonable one; there is no contention that this law does not operate equally on all those in the same class; inequality as between members of different classes, or hardships in special cases, does not vitiate the statute.

B

The different methods of collection provided by the statute for the tax on income received by way of compensation for personal services by residents and by nonresidents, does not deprive any person of the equal protection of laws.

The statute follows the form of the present federal income tax law in providing for withholding at the source only against nonresidents. A resident, earning personal service compensation, makes his own return and pays his tax to the Comptroller, while nonresidents are subject to withholding at the source of the tax on their personal service compensation earned within the state *if they do not elect to make their own returns and pay their own taxes.*

That a nonresident *may* make his own return, as a resident *must* make it, and thereby be relieved from any withholding at the source, is in itself an answer to the proposition that he is unduly discriminated against. But even if he were not given this option, the discrimination is a proper and reasonable one.

In making legislative classifications not only the purpose of a law must be considered, but also the means of its administration — the ways in which it may be defeated.

St. John v. *New York*, 201 U. S. 633, 637.

Where a person receives no income except compensation for personal service, an income tax may be enforced against him, if a resident, through personal action, but if he be a nonresident it can only be enforced by interference with the rendition of the service or with the payment of the compensation. This constitutes a real difference in the situations of the two classes, sufficient to justify their separate classification and different treatment. And so long as all members of a class are treated alike, the constitution is not violated.

There are many decided cases in which different methods of procedure against residents and against nonresidents have been upheld.

In *Tappan* v. *Merchant's National Bank,* 19 Wallace 490, this court said (p. 505):

> "The constitution does not require uniformity in the matter of collection. Uniformity in the assessment is all it demands. When assessed the tax may be collected in the manner the law shall provide; and this may be varied to suit the necessities of each case."

In *District of Columbia* v. *Brooke,* 214 U. S. 138, this court upheld a congressional drainage act affecting the District of Columbia and providing for its enforcement by civil process against nonresidents and by criminal process against residents. After pointing out that the prohibition against discrimination in federal laws cannot be stricter nor more extensive than that of the Fourteenth Amendment is upon the states, the court went on to say (p. 150):

> "That Amendment is unqualified in its declaration that a State shall not "deny to

any person within its jurisdiction the equal protection of the laws." Passing on that Amendment, we have repeatedly decided — so often that a citation of the cases is unnecessary — that it does not take from the States the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws. *Billings* v. *Illinois*, 188 U. S. 97; *Heath & Milligan Manufacturing Co. et al.* v. *Worst*, 207 U. S. 338. In the light of these principles the contentions of defendant in error must be judged. The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in *S. John* v. *New York*, 201 U. S. at pages 633, 637, not only the purpose of a law must be considered, but the means of its administration — the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in *Field* v. *Barber Asphalt Co.,* 194

U. S. 618, where a privilege to protest against a street improvement given by the statute assailed to resident property owners and denied to non-resident property owners, was sustained, and the statue held not to violate the equality clause of the Fourteenth Amendment. See *Travellers Ins. Co.* v. *Connecticut*, 185 U. S. 364.

"It is not contended that the act of Congress is not impartial within the classes. The act treats all resident lot owners alike and all non-residents alike. It is contended that there is a difference in the procedure prescribed in case of default, and non-resident lot owners are thereby discriminated against, though they stand in the same relation to the purpose of the law as resident lot owners. In other words, non-resident lot owners are not treated the same as resident owners in like situation, because against resident owners the coercion of the law is by criminal punishment, while against non-resident owners the remedy is by civil proceedings, the District does the work that the non-resident owners neglect and charges the expense thereof on their property. This is a distinction, a discrimination it may be called, but it has even more justification than that sustained in *Field* v. *Barber Asphalt Co., supra.* The statute under consideration in the case at bar enjoins a duty on both resident and non-resident lot owners, a duty necessary to be followed to preserve the health of the city. There is a difference only in the manner of enforcing it, a difference arising from the different situation of the lot owners, and therefore competent for Congress to regard in its legislation. In other words, under the circumstances presented by this record the distinction between residents and non-residents is a proper basis for classification."

In sustaining a statute requiring a bond on attachment in an action against a resident but not in an action against a non-resident, this court said, in *Central Loan & Trust Co.* v. *Campbell Commission Co.*, 173 U. S. 84, 97–98:

" III. The only remaining contention to be considered is the claim that the territorial statute authorizing the issuance of an attachment against the property of a non-resident defendant in the case of an alleged fraudulent disposition of property is repugnant to the Fourteenth Amendment to the Constitution of the United States and in conflict with the Civil Rights Act. The law of the territory, it is said, in case of an attachment, for the cause stated, against a resident of the Territory requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it has been construed to make no such requirement in the case of an attachment against a non-resident. This, it is argued, is a discrimination against a non-resident, does not afford due process of law, and denies the equal protection of the laws. The elementary doctrine is not denied that for the purposes of the remedy by attachment, the legislative authority of a state or territory may classify residents in one class and non-residents in another, but it is insisted that where non-residents 'are not capable of separate identification from residents by any facts or circumstances other than that they are non-residents, that is, when the fact of non-residence is their only distinguishing feature — the laws of the state or territory cannot treat them to their prejudice upon that fact as a basis of classification.'

" When the exception, thus stated, is put in juxtaposition with the concession that there is such a difference between the resi-

dents of a state or territory and non-residents, as to justify their being placed in distinct classes for the purpose of the process of attachment, it becomes at once clear that the exception to the rule, which the argument attemps to make, is but a denial, by indirection, of the legislative power to classify which it is avowed the exception does not question."

Many statutes taxing corporate shares and requiring the corporation to withhold at the source against non-residents but not against residents have been upheld. Typical of the decisions in these cases are *Travellers' Insurance Co.* v. *Connecticut*, 185 U. S. 364, quoted above, and *Merchants' and Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461, where the court said (p. 463):

"If it be said that the lack of uniformity renders the statute obnoxious to that part of the Fourteenth Amendment to the Federal Constitution which forbids a State to 'deny to any person within its jurisdiction the equal protection of the laws,' it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all bank shares, whether state or national, rests the ordinary state tax of four mills. To every bank, state and national, and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and

whose stock is only worth par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose, for any fair reason affecting only its internal affairs, the State should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution.

"Again, it will be perceived that this inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes and payment without litigation. To justify the propriety of such inducement, we need look no further than the present litigation. It is common practice in the States to offer a discount for payment before the specified time, and impose penalties for nonpayment at such time. This, of course, results in inequality of burden, but it does not invalidate the tax. The inequality of result comes from the election of certain taxpayers to avail themselves of privileges offered to all."

These cases are directly in point in the case at bar. The cases cited under title II above (pp. 21–22) are also in point on this question.

The plaintiff's counsel, in the lower court, argued that the requirement of section 366 that two per cent. be withheld constituted a further discrimination as well as a deprivation of due process of law, in cases where the tax rate is only one per cent. As Judge Knox pointed out in his opinion, this provision of the statute is obviously due to inadvertence in its amendment, and that it cannot have any harmful effect is shown by the opinion of the attorney-general of the State upon which the comptroller made the regulation requiring withholding agents to withhold no more than the amount of the tax (see p. 51 of the Record). That opinion is set forth in appendix (p. 62). As stated under title I, above, (p. 9) the court looks to the effect rather than the phraseology of the statute, and the effect of the statute and regulations in this case is to require the withholding of no more than the amount of the tax.

IV

THE NEW YORK INCOME TAX LAW DOES NOT DENY TO ANY PERSON DUE PROCESS OF LAW.

A. As to the "Withholding Agent"

The plaintiff's contention is that since it is required to make a return of information with respect to income paid, and to withhold the tax from the compensation for personal services of non-residents, both of which requirements necessitate the disbursement of its moneys for clerk hire, otherwise unnecessary, it is thereby deprived of property without due process of law.

Accepted usages constitute due process of law. Compelling one to give information, and garnishment, are among the commonest forms of procedure customary in our courts. A subpoena, compelling a hundred-dollar-a-day man to lay aside all other business and attend to testify, bringing books and papers, at a nominal witness fee or no fee at all (as is customary in the case of defendant's witness in criminal procedure) undoubtedly deprives the witness of property — his valuable time — but no court would listen for a moment to the proposition that he was being deprived of property without due process of law. Requiring a " withholding agent " to make a return of information is much less of a hardship than requiring him to appear and give evidence in an action to enforce a tax — yet the latter would be proper and necessary were the state not permitted to compel the return of information at the source.

And withholding at the source is but a form of garnishment.

Statutes requiring both information and withholding at the source have been upheld innumerable times by the courts. We have no doubt we could discover a hundred cases where such statutes have been held constitutional in this court, where counsel raised this point or considered it not worth raising. We consider it sufficient to refer to a few cases which we have already cited:

The New York Stock Transfer Tax which requires brokers to make records of sales and to affix stamps or see that they are affixed, was upheld in *Peo. ex rel. Hatch* v. *Reardon,* 204 U. S. 152. The Pennsylvania tax on shares of bank

stock, requiring corporations to make returns of information and to deduct the tax against non-residents was upheld in *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461. The Connecticut tax making similar requirements was upheld in *Travelers' Ins. Co.* v. *Connecticut*, 185 U. S. 364.

The Federal Income Tax Law of 1913 was attacked in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1 — all imaginable objections to its constitutionality being raised. It appears from the report of that case that counsel submitted that in many different ways the statute denied due process of law. But the court dismissed these contentions practically as if it considered them frivolous. It said (p. 21):

> "Without expressly stating all the other contentions, we summarize them to a degree adequate to enable us to typify and dispose of all of them. * * *. 2. The act provides for collecting the tax at the source, that is, makes it the duty of corporations, etc., to retain and pay the sum of the tax on interest due on bonds and mortgages, unless the owner to whom the interest is payable gives a notice that he claims an exemption. This duty cast upon corporations, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation,"

and at pages 24–25 continued:

> "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause

is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat* v. *White*, 181 U. S. 264; *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co., supra; Billings* v. *United States*, 232 U. S. 261, 282. * * *. NONE OF THE PROPOSITIONS RELIED UPON IN THE REMOTEST DEGREE PRESENT SUCH QUESTIONS." (Capitalization ours.)

The requirements of the New York statute with respect to withholding at the source are very mild in comparison with those of the Federal act of 1913. That they may work a hardship on this plaintiff does not render the law unconstitutional — we think we have sufficiently pointed this out in Title III.

B. As to the Taxpayers.

Section 374 of the statute allows any taxpayer (and there is no distinction here between residents and non-residents) to apply to the comptroller at any time within a year from the time of filing the return, for a revision of his tax; and section 375 provides for the review by certiorari of the comptroller's determination.

This constitutes due process of law.

Michigan Central R. R. v. *Powers*, 201 U. S. 245.

Bristol v. *Washington County*, 177 U. S. 133.

Merchants' & Manufacturers' Bank v. *Pennsylvania*, 167 U. S. 461.

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S. 232.

V

THE NEW YORK INCOME TAX LAW DOES NOT VIOLATE THE COMMERCE CLAUSE OF SECTION 8 OF ARTICLE I OF THE CONSTITUTION.

In the recent decision of this court in *U. S. Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321, where the Wisconsin income tax was attacked as violating the Commerce Clause, and was held constitutional, a paragraph of the headnote, condensing the language of the opinion reads as follows:

> "A state in laying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Constitution."

The fact that the New York statute so taxes both residents and non-residents, does not constitute a greater interference with the exclusive congressional jurisdiction than would the taxation of residents or domestic corporations only.

In view of that decision and of the decision in *Peck & Co.* v. *Lowe,* 247 U. S. 165, we deem it unnecessary to dwell further on this point.

VI

THE NEW YORK INCOME TAX DOES NOT IMPAIR THE OBLIGATION OF CONTRACTS IN VIOLATION OF CLAUSE 1 OF SECTION 10 OF ARTICLE I OF THE CONSTITUTION.

If the prohibition of laws impairing the obligation of contracts were to be held to prevent otherwise proper taxation, our state governments would have to go out of business. Persons make

contracts subject to the lawful demands, present or future, of the sovereigns under whose jurisdiction they make them or expect to enforce or execute them. Nobody would suggest that a contract by which a man agreed to give all his time to a certain occupation would relieve him of jury duty or militia duty, whether the statute requiring the duty were passed before or after the making of the contract. Nobody would suggest that a covenant for the quiet enjoyment of a parcel of land would forever exempt it from new taxes. Why should a contract for services at a given rate exempt the parties from taxation on their income from the product or their compensation for the performances of those services? The tax on personal service compensation is a tax against the recipient of the compensation, and its deduction at the source is no greater burden on the recipient than its collection from him direct — and no more an impairment of the obligation of the contract.

Since the decision of the *Legal Tender Cases, Knox* v. *Lee,* 12 Wall. 457, the law has been settled that:

> "as in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercises of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority." (p. 551.)

In the recent case of *Tanner* v. *Little,* 240 U. S. 369, this court considered a state law imposing

a prohibitive tax of $6,000 a year on every merchant distributing trading stamps and similar profit sharing coupons. The statute was attacked on the ground that it impaired the obligation of contracts between distributors and redeemers of such coupons, but the court upheld the tax, on the authority of *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S., 467, to which case as well as the many cases cited therein at page 480, we respectfully refer.

VII

THE DECREE BELOW SHOULD BE REVERSED AND THE BILL OF COMPLAINT DISMISSED.

Respectfully submitted,
CHARLES D. NEWTON,
Attorney General of New York
Solicitor for Appellant.

of Counsel,
JAMES S. Y. IVINS.

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APPENDIX.

OPINION OF ATTORNEY-GENERAL OF NEW YORK:

Excerpt from "Income Tax Letter No. 1" to the Comptroller, May 29, 1919:

"1. What deductions from salaries, wages, etc. should be made by 'withholding agents' under § 366?

"As this chapter was originally drafted, it provided for a two per cent basis for the income tax, regardless of the amount of the taxpayer's total income (1919 Senate Bill Pr. No. 1427). In the last days of the legislative session the bill was amended to provide for progressive rates of taxation — one per cent on the amount of net income not exceeding ten thousand dollars; two per cent on net income between ten thousand and fifty thousand; and three per cent on net income in excess of fifty thousand dollars (§ 351). In the haste of hurried amendment the framers of the bill overlooked the provisions of § 366 and neglected to make corresponding changes, so the first subdivion of that section as enacted provides that 'every withholding agent shall deduct and withhold two per cent' etc.— no distinction being made between the three classes of income.

"If it were not for the phraseology of other subdivisions of section 366, the first subdivision might make it unavoidably incumbent upon a withholding agent to withhold two per cent in every case, even where the tax payable to the State is only one per cent. But the phraseology of subdivisions three, four and five is such as to make the requirement that two per cent be withheld purely technical, and unenforceable

to the extent of more than one per cent in cases where the net income is ten thousand dollars or less. Subdivision one requires the withholding of two per cent of determinable annual or periodical income *taxable* under this article. Section 351 makes incomes of ten thousand dollars or less taxable at only one per cent. Subdivision 3 of § 366 requires the withholding agent to make return and pay ' the tax ' to the Comptroller. Where the tax is only one per cent, that is all that need be paid to the Comptroller. The penalty for failure to withhold is merely a liability to pay *the tax* with penalties, if it be not paid by the recipient of the income. So in case of an income of ten thousand dollars or less, the withholding agent is protected against claim by the State if he pays one per cent to the Comptroller — and there can be no object in his withholding or paying more. Further, the withholding agent is only indemnified against claims by the recipient of income to the extent of *payments made* (not amounts withheld) in accordance with the provisions of the section, and the only payments provided for are payments of *the tax*. It would follow that if more be withheld than is required to pay *the tax*, the withholding agent will be liable to the recipient of the income for the balance. And the recipient would probably enforce his claim for such balance, since he will only be credited (under subdivision 4) on making his own return with the amount of *the tax* so withheld. Also it is provided in subdivision 5 that if the recipient pay his own *tax* on the amount received, it shall not be recollected (by the Comptroller) from the withholding agent.

" I am therefore of the opinion that the Comptroller may advise withholding agents against withholding more than one per cent on incomes of ten thousand dollars or less.

[Ninety folios]

LAWS OF NEW YORK.—By Authority.

Chap. 627.

AN ACT to amend the tax law, in relation to imposing taxes upon and with respect to incomes.

Became a law May 14, 1919, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," is hereby amended by adding a new article to be article sixteen, to read as follows:

ARTICLE 16.

TAXES UPON AND WITH RESPECT TO PERSONAL INCOMES.

Section 350. **Definitions.** For the purpose of this article and unless otherwise required by the context:

1. The word "comptroller" means the state comptroller.

2. The word "taxpayer" includes any person, trust or estate subject to a tax imposed by this article, or whose income is in whole or in part subject to a tax imposed by this article, and does not include corporations.

3. The words "military or naval forces of the United States" include the marine corps, the coast guard, the army nurse corps, female, and the navy nurse corps, female, but this shall not be deemed to exclude other units otherwise included within such words.

4. The words "taxable year" mean the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this article. The words "fiscal year" mean an accounting period of twelve months, ending on the last day of any month other than December.

5. The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporate, acting in any fiduciary capacity for any person, trust or estate.

6. The word "paid" for the purposes of the deductions and credits under this article, means "paid or accrued" or "paid or

incurred," and the terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed, under this article. The term "received" for the purpose of the computation of net income under this article, means "received or accrued" and the term "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article.

7. The word "resident" applies only to natural persons and includes for the purpose of determining liability to the tax imposed by this article upon or with reference to the income of any taxable year, commencing with the year nineteen hundred and nineteen, any person who shall, at any time on or after January first and not later than March fifteenth of the next succeeding calendar year, be or become a resident of the state.

8. The word "dividend" means any distribution made by a corporation out of its earnings or profits to its shareholders or members, whether in cash or in other property or in stock of the corporation.

9. The words "foreign country" or "foreign government" mean any jurisdiction other than one embraced within the United States. The words "United States" include the states, the territories of Alaska and Hawaii and the District of Columbia.

10. The words "withholding agent" include all individuals, corporations, associations and partnerships, in whatever capacity acting, including lessees, or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the state, or of any municipal corporation or political subdivision of the state, having the control, receipt, custody, disposal or payment, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits and income taxable under this article.

§ 351. **Imposition of income tax.** A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per

centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, or for any taxable year ending during the year nineteen hundred and nineteen.

§ 352. **Exemption of certain personal property from taxation.** The taxes imposed by this article are in addition to all other taxes imposed by law, except that money on hand, on deposit or at interest, bonds, notes and choses in action and shares of stock in corporations other than banks and banking associations, owned by any individual or constituting a part of a trust or estate subject to the income tax imposed by this article, and from which any income is derived, shall not after July thirty-first, nineteen hundred and nineteen, be included in the valuation of the personal property included in the assessment-rolls of the several tax districts, villages, school districts and special tax districts of the state.

§ 353. **Ascertainment of gain and loss.** For the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, the basis shall be first, in case of property acquired before January first, nineteen hundred and nineteen, the fair market price or value of such property, as of January first, nineteen hundred and nineteen, and, second, in case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with this article.

§ 354. **Exchange of property.** When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger or consolidation of a corporation a taxpayer receives, in place of stock or securities owned by him, new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securi-

ties received shall be treated as taking the place of the stock, securities or property exchanged.

§ 355. **Gain through exchange.** When in the case of any such reorganization, merger or consolidation the aggregate par or face value of the new stock or securities received is in excess of the aggregate par or face value of the stock or securities exchanged, a like amount in par or face value of the new stock or securities received shall be treated as taking the place of the stock or securities exchanged, and the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost of the stock or securities exchanged, if acquired on or after January first, nineteen hundred and nineteen, and its fair market price or value as of January first, nineteen hundred and nineteen, if acquired before that date.

§ 356. **Inventory.** Whenever in the opinion of the comptroller the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the comptroller may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income, and conforming so far as may be to the forms and methods prescribed by the United States commissioner of internal revenue under the act of congress known as the revenue act of nineteen hundred and eighteen.

§ 357. **Net income defined.** The term "net income" means the gross income of a taxpayer less the deductions allowed by this article.

§ 358. **Computation of net income.** 1. The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the comptroller does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in this article, or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

2. If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the comptroller, be computed on the basis of such new accounting period, subject to the provisions of section three hundred and seventy.

§ 359. **Gross income defined.** The term "gross income":

1. Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but

2. Does not include the following items which shall be exempt from taxation under this article:

a. The proceeds of life insurance policies and contracts paid upon the death of the insured to individual beneficiaries or to the estate of the insured.

b. The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract.

c. The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income).

d. Interest upon the obligations of the United States or its possessions; or securities issued under the provisions of the federal farm loan act of July seventeen, nineteen hundred and sixteen; or bonds issued by the war finance corporation; or the obligations of the state of New York or of any municipal corporation or political subdivision thereof; or investments upon which the tax provided for in section three hundred and thirty-one of this chapter has heretofore been paid since June first, nineteen hun-

dred and seventeen, during the period of years for which such tax shall have been paid.

e. Any amount received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

f. Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States.

g. Income received by any officer of a religious denomination or by any institution, or trust, for moral or mental improvement, religious, bible, tract, charitable, benevolent, fraternal, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes, if such income be used exclusively for carrying out one or more of such purposes; but nothing herein shall be construed to exempt the fees, stipends, personal earnings or other private income of such officer or trustee.

3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article.

§ 360. **Deductions.** In computing net income there shall be allowed as deductions:

1. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

2. In the case of a resident of the state such a proportion of the total interest paid or accrued during the taxable year on in-

debtedness, as the net income of the taxpayer taxable under this article bears to his total income from all sources; or in case of an individual not a resident of the state, the same proportion of interest paid or accrued within the taxable year on indebtedness which the amount of such gross income, as herein defined, bears to the gross amount of his income from all sources within and without the state.

3. Taxes other than income taxes paid or accrued within the taxable year imposed, first, by the authority of the United States, or of any of its possessions, or, second, by the authority of any state, or territory, or any county, school district, municipality, or other taxing subdivision of any state or territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed, or, third, by the authority of any foreign government.

4. Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business.

5. Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a taxpayer other than a resident of the state, only as to such transactions within the state.

6. Losses sustained during the taxable year of property not connected with the trade or business (but, in the case of a taxpayer other than a resident, only of property within the state) if arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise.

7. Debts ascertained to be worthless and charged off within the taxable year.

8. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

9. In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted; provided, that in the case of such properties acquired prior to January first, nineteen hundred and nineteen, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date; provided, further, that in the case of mines, oil and gas

wells, discovered by the taxpayer on or after January first, nineteen hundred and nineteen, and not acquired as the result of a purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the comptroller. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

10. Contributions or gifts made within the taxable year to corporations incorporated by, or associations organized under, the laws of this state and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation authorized by section seven of the act of congress known as the vocational rehabilitation act, to an amount not in excess of fifteen per centum of the taxpayer's net income as computed without the benefit of this subdivision. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the comptroller. In the case of a taxpayer other than a resident of the state this deduction shall be allowed only as to contributions or gifts made to corporations or associations incorporated by or organized under the laws of this state or to the vocational rehabilitation fund above mentioned.

11. In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations to be prescribed by the comptroller.

§ 361. **Items not deductible.** In computing net income no deduction shall in any case be allowed in respect of:

1. Personal, living, or family expenses;

2. Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

3. Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or

4. Premiums paid on any life insurance policy, covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy.

§ 362. **Exemptions.** The following exemptions shall be allowed to any resident taxpayer:

1. In the case of a single person, a personal exemption of one thousand dollars, or in the case of the head of a family or a married person living with husband or wife, a personal exemption of two thousand dollars. A husband and wife living together shall receive but one personal exemption of two thousand dollars against their aggregate net income; and in case they make separate returns, the personal exemption of two thousand dollars may be taken by either or divided between them.

2. Two hundred dollars for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer, if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

3. A taxpayer receiving salary, wages, or other compensation from the United States as an official thereof, exempt from taxation under this article, shall be entitled to only so much of the personal exemption provided for in this section as is in excess of the aggregate amount of such salaries, wages, or other compensation.

§ 363. **Credit for taxes in case of taxpayers other than residents of the state.** Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this state and subject to taxation under this article, the comptroller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed

only if the laws of said state or country grant a substantially similar credit to residents of this state subject to income tax under such laws.

§ 364. **Partnerships.** Individuals carrying on business in partnerships shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed. Taxpayers who are members of partnerships may be required by the comptroller to make a return stating the gross receipts and net gains or profits of the partnership for any taxable year. The net income of the partnership shall be computed in the same manner and on the same basis as provided in computing the net income of individuals except that the deduction provided in subdivision ten of section three hundred and sixty shall not be allowed and the personal exemptions provided for in section three hundred and sixty-two shall be allowed only to the individual partners.

§ 365. **Estates and trusts.** 1. The tax imposed by this article shall apply to the income of estates or of any kind of property held in trust, including:

a. Income received by estates of deceased persons during the period of administration or settlement of the estate;

b. Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

c. Income held for future distribution under the terms of the will or trust; and

d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

2. The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in this article for individual tax-

payers, except that there shall also be allowed as a deduction any part of the gross income which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph d of subdivision one of this section, the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

3. In cases under paragraphs a, b, and c of subdivision one, of this section, the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases, the estate or trust shall be allowed the same exemptions as are allowed to single persons under section three hundred and sixty-two, and in such cases an estate or trust created by a person not a resident and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under section three hundred and fifty-nine, subdivision three.

4. In cases under paragraph d of subdivision one of this section and in the case of any income of an estate during the period of administration or settlement permitted by subdivision three to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such

cases the income of a beneficiary of such estate or trust not a resident shall be taxable only to the extent provided in section three hundred and fifty-nine, subdivision three, for individuals other than residents.

§ 366. **Information and payment at source.** 1. Every withholding agent shall deduct and withhold two per centum from all salaries, wages, commissions, gratuities, emoluments, perquisites and other fixed and determinable annual or periodical compensation of whatever kind and in whatever form paid or received, earned for personal services and taxable under this article, of which he shall have control, receipt, custody, disposal or payment, if the amount paid or received or to be paid or received in any taxable year on account of any individual equals or exceeds one thousand dollars, unless there shall be filed with the withholding agent, before the time when he is required to make return and payment thereof, a certificate in such form as shall be prescribed by the comptroller to the effect that the person entitled to such salary, wage, commission, gratuity, emolument, perquisite or other compensation is a resident and setting forth his residence address within the state.

2. Every withholding agent shall make return to the comptroller of complete information concerning the amount of all interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable gains, profits and income, except interest coupons payable to bearer, of any taxpayer taxable under this article of one thousand dollars or more in any taxable year under such regulations and in such form and manner and to such extent as may be prescribed by the comptroller.

3. Every withholding agent required to deduct and withhold any tax under subdivision one of this section shall make return thereof on or before the fifteenth day of March in each year and shall at the same time pay the tax to the comptroller. Every such individual corporation or partnership is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this section.

4. Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

5. If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

§ 367. **Taxpayers' returns.** Every taxpayer having a net income for the taxable year of one thousand dollars or over if single or if married and not living with husband or wife, or of two thousand dollars or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this article. If a husband and wife living together have an aggregate net income of two thousand dollars or over, each shall make such a return unless the income of each is included in a single joint return. If the taxpayer is unable to make his own return the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. A taxpayer other than a resident shall not be entitled to the deductions authorized by section three hundred and sixty unless he shall make under oath a complete return of his gross income both within and without the state.

§ 368. **Partnership returns.** Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

§ 369. **Fiduciary returns.** Every fiduciary (except receivers appointed by authority of law in possession of part only of the property of a taxpayer) shall make under oath a return for the taxpayer for whom he acts, first, if the net income of such taxpayer is one thousand dollars or over if single, or if married and not living with husband or wife, or two thousand dollars or over if married and living with husband or wife, or second, if the net income of such taxpayer, if an estate or trust, is one thousand dollars or over or if any beneficiary is a taxpayer other than a resident of the state, which return shall state specifically

the items of the gross income and the deductions, exemptions and credits allowed by this article. Under such regulations as the comptroller may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the comptroller or collector in the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to taxpayers.

§ 370. **Returns when accounting period changed.** If a taxpayer, with the approval of the comptroller, changes the basis of computing net income from fiscal year to calendar year, a separate return shall be made for the period between the close of the last fiscal year for which return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is made from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the last fiscal year. If the change is from one fiscal year to another fiscal year, a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year, he shall make a separate return for the period between the beginning of a calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the exemptions allowed in this article shall be reduced respectively to amounts which bear the same ratio to the full exemptions provided for as the number of months in such period bears to twelve months.

§ 371. **Time and place of filing returns.** Returns shall be made to the comptroller on or before the fifteenth day of March in each year of the taxpayer's net income for his last preceding

taxable year. The comptroller may grant a reasonable extension of time for filing returns whenever in its judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be granted for more than six months. Such returns shall, so far as may be, set forth the same or similar items called for in the blank forms of return prescribed by the United States commissioner of internal revenue for the enforcement of the act of congress known as the revenue act of nineteen hundred and eighteen, together with such other facts as the comptroller may deem necessary for the proper enforcement of this article. There shall be annexed to such return the affidavit or affirmation of the person making the return, to the effect that the statements contained therein are true. Blank forms of return shall be furnished by the comptroller upon application, but failure to secure the form shall not relieve any taxpayer from the obligation of making any return herein required.

§ 372. **Administration of income tax law.** The comptroller shall administer and enforce the tax herein imposed for which purpose he may divide the state into districts in each of which a branch office of the comptroller may be maintained; provided that in no cases shall a county be divided in forming a district.

§ 373. **Powers of comptroller.** If in the opinion of the comptroller any return of a taxpayer is in any essential respect incorrect he shall have power to revise such return, or if any taxpayer fails to make return as herein required, the comptroller is authorized to make an estimate of the taxable income of such taxpayer from any information in his possession, and to audit and state an account according to such revised return or the estimate so made by him for the taxes, penalties and interest due the state from such taxpayer. The comptroller shall also have power to examine or cause to have examined, in case of failure to report the books and records of any such taxpayer, and may take testimony and require proof material for his information.

§ 374. **Revision and readjustment of accounts by comptroller.** If an application for revision be filed with the comptroller by a taxpayer within one year from the time of the filing of the return, or if the tax of such taxpayer shall have been recomputed, then from the time of such recomputation, the comptroller shall grant a hearing thereon and if it shall be made to appear, upon any such hearing by evidence submitted to him or otherwise, that any such

computation includes taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such amount so computed, the comptroller shall resettle the same according to law and the facts, and adjust the computation of taxes accordingly, and shall send notice of his determination thereon to the taxpayer.

§ 375. **Review of determination of comptroller by certiorari and regulations as to writ.** The determination of the comptroller upon any application made to him by any taxpayer for revision and resettlement of any computation of tax, as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter. No certiorari to review any statement of a computation or any determination by the comptroller under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the comptroller of the application for such writ. Before making the application an undertaking must be filed with him, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the comptroller affirmed, the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the writ, including costs of all appeals.

§ 376. **Penalties.** 1. Any person required by this article to make, render, sign or verify any return, who fails to make, render, sign or verify such return within the time required by or under a provision of law, or who makes any false or fraudulent return or statement, with intent to evade any tax imposed by this article, shall be guilty of a misdemeanor and shall, upon conviction, be fined not to exceed one thousand dollars, or be imprisoned not to exceed one year, or both, at the discretion of the court.

2. If any such person shall fail or refuse to make a return of income at the time or times hereinbefore specified, but shall voluntarily make a correct return of income within sixty days thereafter, there shall be added to his tax five per centum of the amount otherwise due, but such additional amount shall in no case be less than two dollars.

3. If any person liable to taxation under this article fails to make a return as herein required, the amount of income of such

person discovered to be taxable shall be subject to twice the ordinary rate of taxation. If any person liable to taxation under this article makes any false or fraudulent return or statement, with intent to evade any tax imposed by this article, and an additional amount is discovered to be taxable, such additional amount shall be subject to twice the ordinary rate of taxation. Such tax shall be collected at such time and in such manner as may be designated by the comptroller. This penalty shall be additional to all other penalties in this or any other section provided.

§ 377. **When payable.** 1. Each taxpayer shall, at the time of filing his return, pay to the comptroller the amount of tax payable hereunder as the same shall appear from the face of the return. If the time for filing the return shall be extended, he shall pay in addition interest thereon at the rate of six per centum per annum from the time when the return was originally required to be filed to the time of payment.

2. As soon as practicable after the return is filed, the comptroller shall examine it and compute the tax.

3. If the amount of tax as computed shall be greater than the amount theretofore paid, the excess shall be paid by the taxpayer to the comptroller within thirty days after the amount of the tax as computed shall be mailed by the comptroller.

4. If the amount of tax as computed shall be less than the amount theretofore paid, the excess shall be refunded by the comptroller out of the proceeds of the tax retained by him as provided in this article.

§ 378. **Notice of assessment.** Notice of tax assessment shall be sent by mail to the post office address given in the report, and the record that such notice has been sent shall be presumptive evidence of the giving of the notice and such record shall be preserved by the comptroller.

§ 379. **Collection of taxes; penalties and interest.** 1. The comptroller is authorized at his discretion to designate agents for the purpose of collecting income taxes and shall require from them reasonable bond.

2. If the tax imposed by this article or any part of such tax be not paid at the time when required to be paid under the provisions of this article or in the case of additional taxes, at the time designated by the comptroller, the taxpayer liable to pay such tax shall pay to the comptroller, in addition to the

amount of such tax, or part thereof, five per centum of said amount, plus one per centum for each month, or fraction of a month, the tax, or part thereof, remains unpaid.

§ 380. **Warrant for the collection of taxes.** If any tax imposed by this article or any portion of such tax be not paid within sixty days after the same becomes due, the comptroller shall issue a warrant under his hand and official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the person owning the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the comptroller and pay to him the money collected by virtue thereof by a time to be therein specified, not less than sixty days from the date of the warrant. The sheriff shall within five days after the receipt of the warrant, file with the clerk of his county a copy thereof, and thereupon the clerk shall enter in the judgment docket, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns the amount of the tax or portion thereof and penalties for which the warrant is issued and the date when such copy is filed, and thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property or chattels real of the person against whom it is issued in the same manner as a judgment duly docketed in the office of such clerk. The said sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any agent authorized to collect income taxes, and in the execution thereof such agent shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty. If a warrant be returned not satisfied in full, the comptroller shall have the same remedies to enforce the claim for taxes against the taxpayer as if the people of the state had recovered judgment against the taxpayer for the amount of the tax.

§ 381. **Action for recovery of taxes.** Action may be brought at any time by the attorney-general of the state at the instance of the comptroller, in the name of the state to recover the amount of any taxes, penalties and interest due under this article.

§ 382. **Distribution of the income tax.** Of the revenue collected under this article the comptroller shall retain in his hands sufficient to provide at all times a fund in his hands in the sum of two hundred and fifty thousand dollars out of which he shall pay any refunds to which taxpayers shall be entitled under the provisions of this article. Of the remainder, fifty per centum shall be paid into the state treasury to the credit of the general fund. The remaining fifty per centum thereof shall, not later than the first day of July, and in case of moneys subsequently collected at least quarterly thereafter, be distributed and paid to the treasurers of the several counties of the state, in the proportion that the assessed valuation of the real property of each county bears to the aggregate assessed valuation of the real property of the state. As to any county included in the city of New York such payment shall be made to the receiver of taxes in such city and be paid into the general fund for the reduction of taxation of the city of New York. The county treasurer shall apportion the amount so received among the several towns and cities within the county in proportion that the assessed valuation of the real property of each town or city bears to the aggregate assessed valuation of the real property of the county, and shall credit the amount apportioned to each town against the county tax payable by it, and shall pay the amount apportioned to each city to the chief fiscal officer of the city to be paid into the general fund for city purposes. If the amount of the credit to a town exceeds the county tax from such town, the excess shall be paid to the supervisor of the town and be by him credited to general town purposes.

§ 383. **Comptroller to make regulations and to collect facts.** The comptroller is hereby authorized to make such rules and regulations, and to require such facts and information to be reported, as it may deem necessary to enforce the provisions of this article.

§ 384. **Secrecy required of official; penalty for violation.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller, any

agent, clerk, or other officer or employee to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this article. Nothing herein shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or the inspection by the attorney-general or other legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted in accordance with the provisions of sections three hundred and eighty and three hundred and eighty-one of this chapter. Reports and returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the state he shall be dismissed from office and be incapable of holding any public office in this state for a period of five years thereafter.

§ 385. **Contract to assume income tax illegal.** It shall be unlawful for any person to agree or contract directly or indirectly to pay or assume or bear the burden of any tax payable by any taxpayer under the provisions of this article. Any such contract or agreement shall be null and void and shall not be enforced or given effect by any court.

§ 2. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 3. An assessment on account of personal property made prior to August first, nineteen hundred and nineteen, shall be as valid and effectual as if this act had not been passed, and nothing in this act shall be construed to impair the obligation to pay taxes assessed on account of personal property in the year nineteen hundred and eighteen or the year nineteen hundred and nineteen prior to August first whether payable in that year or not.

§ 4. If in any city entitled to receive a portion of the taxes collected under article sixteen of the tax law as added by this act the budget for the fiscal year current on July first, nineteen hundred and twenty, shall be completed prior to that date, the board of estimate and apportionment or other board or body having the duty of preparing the budget in such city shall have the power subsequent to such date and before the levy of the taxes on account of the appropriations made by such budget to revise the estimates of city revenue so as to include in such calculation the income to the city from taxes collected under article sixteen of the tax law as added by this act.

§ 5. The sum of three hundred thousand dollars ($300,000), or so much thereof as may be needed, is hereby appropriated out of any money in the treasury, not otherwise appropriated, for the administration of article sixteen of the tax law as added by this act, but any position established or salary fixed for such purpose shall be deemed temporary only and subject to the future action of the legislature but no new position shall be created nor salary fixed except on the unanimous approval of the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee.

§ 6. Except as otherwise provided herein this act shall take effect immediately.

STATE OF NEW YORK,
Office of the Secretary of State } ss:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

FRANCIS M. HUGO
Secretary of State